against the debtor in criminal as well as in civil proceedings and as section 17 of our Ordinance has been taken from section 15 of the English Act with only one variation which does not affect the point under consideration it follows, I think, that the law must be the same here.

In *R.* v. *Sloggett*, 7 Cox. C.C. 139 Cresswell J. in the course of his judgment observed that to a certain extent the 117th section of the old Bankruptcy Act (from which section 15 of the present Act was taken) had taken away from a bankrupt under examination before a commissioner, the ordinary privilege of a witness — that of refusing to answer questions which might tend to criminate. In *Rex* v. *Benjamin Scott*, 7 Cox C.C. 164 it was held by the Court of Criminal Appeal that the examination of a bankrupt in the Court of Bankruptcy touching his trade dealings and estate was admissible in evidence against him upon a criminal charge though the answers might have been extracted from him under threat of committal and might be criminatory of himself. The case was followed in *R.* v. *Hillam*, 12 Cox C.C. 174 which was decided under the 1869 Act. In the old Acts it was provided that the bankrupt should be examined as to his "trade dealings and estate." Under the provisions of section 15 of the 1914 Act he is to be examined as to his "conduct dealings and property" these words being the same as those used in section 17 of our Ordinance. The question of what is covered by the word "conduct" in section 15 of the English Act was considered by the Court of Appeal in *In re Paget*, [1927] 2 Ch. 85. In his judgment, Lord Hanworth M.R. laid it down that the object of the examination is not merely for the purpose of collecting debts or ascertaining what sum is available but also for the purpose of the protection of the public and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court. He went on to say that he agreed with the decision of Phillimore J. in *In re Atherton*, [1912] 2 K.B. 251 that in the course of the public examination of a debtor the debtor is not entitled to refuse to answer to questions put to him on the ground that the answers thereto may incriminate him.

The attention of the learned District Judge was not drawn to any of these decisions and it seems to me that if they had been brought to his notice he would probably have admitted the evidence.

The answer to the question submitted in the case stated must be that the evidence was admissible and should not have been excluded.

Judgment accordingly.

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[133] SHAIK SAHIED BIN ABDULLAH BAJARAI v. TAN BOON GUAN

[O.C.J. (Barrett-Lennard J.) August 31, 1920]
[Singapore Suit No. 141 of 1920]

Mortgage — Assignment of equity — Notice by assignee of intention to redeem — Sale to third party by mortgagee notwithstanding notice.

A notice of intention to redeem does not suspend the exercise by the mortgagee of his powers of sale unless accompanied by a tender of the debt due subject to the performance by the mortgagee of his correlative obligations.

A claim for interest in lieu of notice intimates a present intention to waive any power of sale vested in the mortgagee during the period covered by the claim.

The mortgagee can, however, revive his power of sale at any time by serving a reasonable notice of his intention to exercise it on the mortgagor. If the conduct of the mortgagee justifies the impression that time is not of the essence of the right to keep the power of sale in abeyance, he cannot, after the notice to redeem has run out, sell the mortgaged property without first giving the mortgagor reasonable notice.

TRIAL OF ACTION.

Koek (*Snr.*) for the plaintiff.

G. S. Carver and *W. L. Stevens* for the defendant.

The plaintiff who was the assignee of an equity of redemption in certain land gave notice to the mortgagee of his intention of paying off the mortgage and enquired what was the amount due thereunder. On 20th of November, 1919 the mortgagee's solicitors forwarded to the plaintiff's solicitors an account including therein 3 months' interest in lieu of notice, and lent them the title deeds relating to the property. The plaintiff, however, deferred payment until after the expiration of the 3 months from which the interest was claimed. On the 18th February, 1920, the plaintiff's solicitors returned to the defendant's solicitors the title deeds together with a draft release and by a letter which accompanied the deeds stated that the amount claimed by the defendant was in their hands. The defendant's solicitors did not approve the draft release, and on the 27th February defendant instructed his solicitors not to proceed any further since he had sold the property and notice of this fact was given to plaintiff on the 3rd March. The plaintiff thereupon brought an action for a declaration that the contract to sell the property was invalid against the plaintiff and for an injunction restraining defendant from proceeding with the sale.

Barrett-Lennard J.: This action is brought by the plaintiff, as the assignee of the equity of redemption in certain land containing about 7 acres and 32 poles, and situate in Paya Lebar, Singapore, for (a) redemption of two mortgages, (b) a declaration that a contract for sale dated the 27th of February, 1920 entered into by the defendant with one Lee Hoon Leong in purported exercise of the power of sale vested in him as the mortgagee, is invalid as against the plaintiff, and (c) an injunction to restrain the defendant from proceeding with the sale. The case was argued in an exhaustive and able manner and I am much indebted to the learned counsel for the assistance rendered. The facts, with one exception, are not in dispute. The exception is that the plaintiff affirms, and the defendant denies, that the defendant was, or is, a mortgagee in possession. In my judgment it is clear that subject to the sale contract which purports to confer the right to possession on the purchaser as from the 15th of March, 1920, the defendant was not and is not such a mortgagee. The oral evidence shows I think that, in spite of the contract, the original mortgagor is at present the occupant of the land and in receipt of such produce rubber and coconuts — as it yields. Thus, no order can under any circumstances be made in accordance with the

form finally settled by Sir George Jessel in *Mayor* v. *Murray* (8 Ch. D. 424). The undisputed and relevant facts are few. On the 11th November, 1919 the plaintiff gave the defendants and their solicitors notice of his intention to redeem, and enquired the amount due under the mortgages.

On the 20th of that month the firm addressed sent the account of the moneys due including three months' interest in lieu of notice. Two days later, in accordance with a local custom unknown in England, they lent the documents of title relating to the property to the plaintiff's solicitors so as to enable them, to see that the defendant had the right to reconvey, and draft the usual supplemental deed. The plaintiff, apparently, decided to postpone actual payment until the expiration of three months for which interest was claimed, namely the 20th of February, 1920. At any rate nothing further was done until the 18th of February when the title deeds and the draft release were sent to the defendant's solicitors, accompanied by a letter, in which the writers, the plaintiff's solicitors, stated that the monies due up to the 20th of February, being the sum claimed by the defendant, were in their hands. The defendant's solicitors never approved the draft. On the 25th February they were pressed to do so, on the 27th one of the gentlemen in their office undertook to carry through the business. On the same day, however, the defendant instructed the firm to proceed no further since he had sold the property and notice of this fact was given to the plaintiff on the 3rd of March. The writ was issued on the 4th of that month, and on the 11th the plaintiff paid the mortgage debt into Court and gave notice of such payment to the defendant. On the 15th of March this Court granted an injunction restraining the defendant from proceeding with the sale until the trial or further order. The purchaser was not then, and is not now, a party to the action. I gather, however, from two letters, before me, and dated the 27th and 29th of [134] March, [134] that it is not his wish to be a party. I have decided, therefore, to pronounce judgment in his absence, but, if this case should go to the Court of Appeal, he can still be joined. Before passing to the point raised by the learned counsel, it is desirable to state, that the power of sale became exercisable long before November 1919, owing to interest being in arrear, and that the defendant did not personally learn that the mortgage debt was ready for him in exchange for a duly receipted release and the other title deeds before he entered into the contract of sale. His impression, apparently, was that the notice of the intention to redeem had been abandoned. This impression though it relieves the defendant of the charge of any offence in point of morals, cannot impair the plaintiff's rights. The course pursued by the defendant's solicitors must in point of law be imputed to him it being admitted they had authority to treat with the plaintiff. I now come to the issues which were in controversy. The main question was, what is the effect of a notice of an intention to redeem a mortgage, Mrs. Carver's point being that it cannot suspend the authority to sell delegated by the mortgage deed to the mortgagee.

The true view is that a notice to redeem does not suspend the exercise by the mortgagee of his powers unless accompanied by a tender of the debt due subject to the performance by the mortgagee of his correlative obligations or supposing the mortgagee refuses to be redeemed, or impose conditions which are inadmissible in the eyes of the mortgagor unless the notice is followed by the institution of a redemption suit and the lodgment of the debt in Court. In either of these cases the power of sale is in suspense and effect to this alteration in the mortgagee's position is recognised by the grant of an interim or perpetual injunction restraining the carrying out of any contract of sale entered into after the notice of the intention to redeem. But happily for the well-being of mankind, the mortgagee generally accepts the notice of redemption, forwards his account, and claims interest in lieu of notice unless, of course, the mortgagor has, in view of such claim, postponed the date of payment. According to the understanding, which prevails among conveyancers, a claim for interest in lieu of notice intimates a present intention to waive any power of sale vested in the mortgagee during the period covered by the claim.

The mortgagee, however, can revive his power of sale at any time subject to serving a reasonable notice of his intention to exercise it on the mortgagor. If the conduct of the mortgagee justifies the impression that time is not the essence of the right to keep the power of sale in abeyance, he cannot, after the notice to redeem has run out, sell the mortgaged property without first giving the mortgagor such information as I have indicated. In *Hughes* v. *Metropolitan Railway Company* (2 A.C. 439) the learned Lords explained how at variance with the settled principles of equity would be any other rule. In the present case it is plain from the facts already narrated that the defendant led the plaintiff to suppose, first that he was willing to be paid off at any time between the 20th of November and the 20th of February, and secondly that payment on the last mentioned date was not essential for the preservation of the plaintiff's equity. In my opinion, the despatch of the draft release on the 18th of February, though late, afforded sufficient time for the approval, engrossment and execution of a simple document. But if such were not the case, the defendant's solicitors should have said so forthwith. In my judgment the conduct pursued by the defendant was quite inadmissible. It constituted a violation of the compact implied by law when the relation of mortgagor and mortgagee subsists. There must be a declaration that as between the plaintiff and defendant the contract of the 27th of February is unauthorised by the power of sale vested in the defendant and is invalid. The defendant must be restrained from conveying, or attempting to convey, the mortgaged property pursuant to the contract. I was not asked to, and shall not treat, the notice of the 18th of February as equivalent in equity to a tender of the mortgage debt. The defendant will, therefore, be entitled in accordance with settled practice to interest as from the 20th of February until the 11th of March at the rate reserved, by the mortgage deeds, as from the last mentioned date he will receive such interest

as the deposit has produced. There will be a formal account on this footing. Upon the plaintiff paying to the defendant what shall be certified to be due to him, within one month of the Registrar's certificate, the defendant must reconvey the mortgaged property. I need not deal with any other part of the decree (such minutes are to be submitted) except the Order with reference to costs. A mortgagee is entitled by contract to all the costs of a redemption suit unless by signing against the terms of that contract he has merited the condemnation of the Court. In such a case he forfeits his own costs and may be made to pay those of the mortgagor. An order of this sort has been made where a mortgagee refused an offer rightly made to redeem him. See *Squire* v. *Pardoe* (1891 W.R. 100). Other authorities are *Charles* v. *Jones* (33 Ch. D. 84), *Heath* v. *Chinn* (98, L.T. 855), *Rourke* v. *Robinson* ([1911] Ch. D. 480) and *Graham* v. *Seal* (L.T. Vol. 119, 526). Having regard to these cases I feel constrained to order the defendant to pay the costs of this action

Judgment accordingly.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

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[135] F.M.S. REPORTS

SOCKALINGAM CHETTY v. NAGAPPA PILLAY

[A.C.J. (Aitken J.) February 28, 1936]

[Negri Sembilan Magistrate's Civil Appeal No. 25 of 1935]

Civil Procedure Code (Cap. 7), s.241 — Decree satisfied out of Court — Payment not certified or recorded.

It is not open to the Court to enquire into the fact of payment of a decree not certified or recorded as provided in section 241 of the Civil Procedure Code even though fraud is alleged on the part of the judgment creditor.

M. E. A. Farr for the appellant.

E. Jeff for the respondent.

Aitken J.: Section 241 of the Civil Procedure Code provides that a payment which has neither been certified by the judgment creditor nor recorded by the Court at the instance of the judgment debtor, shall not be recognised as a payment of the decree by the Court executing the same. This section has frequently been considered by the Indian Courts, and it seems to have become settled law that the Court is bound to refuse to inquire into any alleged payments which are uncertified and unrecorded, even though fraud is alleged on the part of the judgment creditor. In other words the section must be taken to mean what he says, and the language in which it is couched is clear and uncompromising.

Now in this matter the learned Magistrate not only investigated an alleged payment by the judgment debtor which was neither certified nor recorded, but proceeded to accord it full recognition and to refuse the judgment creditor's application for an order that the decree in question should be executed. In doing so he acted contrary to the express terms and provisions of section 241 of the Civil Procedure Code, and since the judgment debtor could only advance the alleged uncertified and unrecorded payment as a reason why the decree should not be executed, I think the learned Magistrate should have made an order for it to be executed.

This appeal is therfore allowed, and the matter remitted to the Court of the First Magistrate at Seremban for an order to be made that the decree in question be executed.

As the point on which the decision of this appeal has turned was not included in the Memorandum of Appeal, and was taken by the Court, there will be no order as to costs.

Appeal allowed.

DEWANI BIN KULOP WAKANG v. MUNAH BINTI NGAH BEDAHU

[A.C.J. (Howes J.) February 7, 1936]

[Perak Civil Application No. 21 of 1935]

Land Code, ss.107 and 237 — Appeal from Collector — Jurisdiction of Collector under s.107.

Appeals under sub-section (xii) of section 107 of the Land Code, 1926, are governed by section 237.

When a transfer, voluntarily executed, has been registered, section 107 of the Land Code, 1926, does not confer jurisdiction upon a Collector to adjudicate upon allegations made by the transferor that there has been undue influence or that the transfer should be rescinded on account of an alleged oral agreement to vary it or that there has been a breach of trust. In such cases the remedy of the transferor is to bring a suit for rescission of the contract of transfer.

S. B. Sinha for the appellant.

J. S. Chabra for the respondent.

Cur. Adv. Vult.

Howes J.: This is an appeal by way of petition against the decision of the Collector of Land Revenue, Parit, by which he ordered:

"Entry Mukim Register No. 1505 Mukim of Laiang Laiang to be registered in the name of Munah binti Dahu."

The petition was headed "Petition under section 237(iii) of the Land Code, 1926," and an objection was taken by counsel for the respondent that as the matter was dealt with by the Collector under section 107 the proper course was by way of appeal under section 107(xii).

Section 107(xii) however merely says: "From any order under this section.....an appeal shall lie to the Court." It does not "specifically prescribe" any other form of appeal, and consequently, it appears to me that appeals under section 107(xii) are to be governed by section 237, which is the section dealing with appeals under the Land Code, generally. The period during which a dissatisfied person may appeal under both sections is the same, viz. 30 days. I therefore see no substance in the objection.

The grounds of appeal shortly are:—

(a) The Collector had no jurisdiction to entertain the application of the respondent.